

SELF-EVIDENT TRUTHS: WHY WE CAN STOP WORRYING AND LOVE THE POSSE COMITATUS ACT

BY

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by

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SELF-EVIDENT TRUTHS: WHY WE CAN STOP WORRYING AND LOVE THE POSSE COMITATUS ACT

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.

— Title 18, US Code, Section 1835
The Posse Comitatus Act

...nations pay little regard to rules and maxims calculated in their very nature to run counter to the necessities of society.

— Alexander Hamilton

The health of a democratic society may be measured by the quality of functions performed by private citizens.

— Alexis-Charles-Henri Clérel de Tocqueville

As Alexander Hamilton penned the thoughts and arguments that would help form the basis of the new American government, he gave pause to consider the popular notion that standing armies represent an anathema to democracy and free society. Hamilton, an outspoken advocate of the central power and authority of the proposed federal government, asserted that such beliefs were misplaced. Indeed, he argued that a standing military force was necessary to secure domestic peace and would be required to quell internal rebellions or uprisings.¹

Today, the popular notion that Hamilton argued against in several Federalist papers has developed into an accepted tenant of American democracy.² Embodied in the Posse Comitatus Act (18 US Code 1835), United States law now codifies the

concern that military force should not be used in an active civilian law enforcement capacity. Another Hamilton thought, however, rings true, as well. Despite the provisions of the PCA, necessity has created the exceptions, both practical and political, that enable the United States military to enforce the laws, restore order, and ensure the peace when civilian capacity fails.³ Further arguments focused on the concern to preserve democratic processes and culture, appropriately prioritize defense resources, reform civilian response efforts, and effectively employ the National Guard suggest that the PCA is a useful check that precludes over-reliance on the military.

The Power of the County...Laws, Militias, and Standing Armies

Commonly translated, posse comitatus refers to the power of the county or the ability of officials to raise men and arms in the interest of civil justice. The concept extends to 12th century England in the Assize of Arms, which established an armed force of men available for the King to maintain social order.⁴ After several centuries of wrangling, the English Bill of Rights in 1748 finally defined posse comitatus as a distinct element of civil law enforcement.⁵ Lord Chief Justice William Mansfield, in 1780, confirmed that incidents of civil disobedience were matters of concern for civil authorities and alleged that military officers acting as a posse comitatus were, in effect, civilians subject to civil law.⁶

The American experience with the domestic employment of military force has evolved in five distinct phases, beginning with the founding of the nation until the 1850 Fugitive Slave Act; from 1850 until the 1878 Posse Comitatus Act, inclusive of the complexities introduced by slavery, the Civil War, and Reconstruction; an extended period of relative calm through the end of World War II; a post-war period again marked

by conflict over racial equality; and, finally, what might be called the Modern Period, from the early 1970s to the present wherein legislative mandates created further exceptions for military support of domestic contingencies. Whether the country has entered a sixth phase, resulting from the 9/11 terrorist attacks and the Katrina disaster, remains uncertain.

As the American states formed their federal union, domestic deployment of the military represented an anticipated need.⁷ Hamilton's commentary in the Federalist Papers acknowledged the use of the military in domestic situations as an eventual and practical consideration.⁸ Shay's Rebellion in western Massachusetts in 1786-87 confirmed that need for many of the 1787 Constitutional Convention participants, but fears of standing armies persisted among conventioners.⁹ After a lengthy convention debate, several constitutional provisions emerged addressing the use of militias in domestic crises. Articles I and II of the Constitution granted Congress and the president authority to employ militias to maintain the peace and enforce laws. Article IV guaranteed the states representative governments and protection from invasion and civil unrest. The Second Amendment to the Constitution further ensured the existence of well-regulated militias while the Tenth Amendment protected states' rights not specifically reserved for, or prohibited by, the national government. As Coakley observes, the dialogue regarding the use of military force domestically focused primarily on state militia forces as a compromise to the lingering concern about standing armies.¹⁰ Apparently the debate centered not on the ends (domestic tranquility) or ways (military force), but the means (state or federal forces) with which to ensure internal security.

Elaborating on the employment of militias, The Judiciary Act of 1789, which established federal courts and the US Marshals Service, implied the ability of federal marshals to use militias as a posse comitatus and suggested that the president could call on the militia in response to domestic and foreign invasions.¹¹ The Calling Forth Act of 1792 expanded the circumstances in which militias could be used in extreme domestic crises, but checked the imposition of federal authority through a process of petition by the state legislature or governor and a requirement for the president to issue a cease and desist order to provocateurs.¹² Three years later, following the successful conclusion of the Whiskey Rebellion, Congress further authorized the president, in certain circumstances, to call up the militia when Congress was not in session and revoked the need for a judicial writ to do so.¹³

Not long thereafter, that authority expanded to include the use of federal forces. President Thomas Jefferson, after suppressing the attempt by Vice-President Aaron Burr to raise an armed force against Spanish interests in the South and West, sought and received authority to employ militia and regular forces against incidents of insurrection in the 1807 Act.¹⁴ That Jefferson, an ardent anti-federalist, would seek such an expression of federal power (he wrote the draft legislation himself), serves as another example of how exigent circumstances affected the evolution of legal proscriptions regarding domestic employment of federal military forces.

It was, however, the issue of slavery that began to sanction the use of standing military forces, rather than state militias, by civil authorities in a law enforcement capacity. The Fugitive Slave Act and the ensuing attempts to return escaped slaves to their owners caused President Millard Fillmore to declare the president's inherent right

to use the federal military, without prior proclamation, to enforce the law. After deliberating with his cabinet, Fillmore expanded that concept to include the right of federal marshals' to call troops into service as authorized by district or Supreme Court justices.¹⁵ A Senate Judiciary Committee opinion, requested by Fillmore, confirmed the federal marshals' authority but neither commented on the President's opinion that a proclamation was unnecessary nor attempted to invoke any congressional prerogative to balance that power.¹⁶ Attorney General Caleb Cushing, in 1854, then opined that, regarding the Fugitive Slave Law, soldiers, whether in federal employ or state militia, could be included in a posse comitatus by federal marshals.¹⁷ Thus, through the perceived needs of the times, a legal expediency was created to justify practical necessity. Cushing's decision would not be the last such pronouncement in the history of domestic security concerns. Later, it would provide a basis for the introduction of federal soldiers into the Reconstruction South, a development probably unforeseen in 1854, even as the country moved inevitably toward civil war.

As the national crisis evolved, the Union faced not only southern succession, but resistance to conscription in the northern states. Characterizing the war as an insurrection established a pretext for the introduction of a broad array of unprecedented powers that affected North and South, including compulsory military service and the subsequent use of the military to confront resistance to the government.¹⁸ Dealing with the South, President Lincoln called for volunteers to fill the Army, blockaded the southern states by sea, and suspended the right of habeus corpus. In the North, he had little choice but to afford military support to northern civil authorities in a series of draft riots that culminated in New York in July 1863. Unfortunately, the Confederate

surrender at Appomattox in 1865 neither ended resistance to the policies of the federal government or the military's role in confronting it.

In the immediate aftermath of the war, Attorney General William Evarts referred back to Cushing's decision to stem the rising influence of the Ku Klux Klan and similar grass roots organizations throughout the South.¹⁹ Evarts urged caution and the use of the military as a last resort. Sadly, it was only the beginning of a decade-long policy that saw more domestic military intervention than in any other time in the nation's history. The 1866 Civil Rights Act, the 14th and 15th Amendments to the United States Constitution, the Reconstruction Acts, and the Ku Klux Klan Act established the legal basis for military intervention into the southern states to enforce laws, subdue civil disturbances, and assist with the re-establishment of state governments.²⁰

Not surprisingly, eleven years of federally-mandated and enforced Reconstruction policies began to unravel. The southern white population, resentful and fearful of the newly-enfranchised former slaves, became increasingly bold in their challenge to federally-supported state governments.²¹ Concurrently, the will of northern supporters and Radical Republicans tired of the efforts to enforce Reconstruction policies.²² The presidential election of 1876 proved a fulcrum event. In exchange for the electoral votes of South Carolina, Florida, and Louisiana, Rutherford B. Hayes won the presidency and removed federal troops from the South, effectively ending Reconstruction.²³ In order to forestall further interventions, Kentucky Congressman J. Proctor Knott offered an amendment to the 1878 Army appropriations bill that introduced the essential provisions of the Posse Comitatus Act.²⁴ Its passage and enactment into law by President Hayes eliminated the only effective force available to

secure the rights of African Americans in the aftermath of the Civil War. Rao suggests that in one stroke Southerners eliminated the antagonist to their preferred lifestyle and rejected the doctrine established in 1850, now turned against them.²⁵ Scheips asserts that the PCA actually re-set the laws governing the domestic use of federal forces back to their original, pre-civil war intent.²⁶ Drew poses an interesting analogy between Southern resistance and terrorism, asserting in the end that the terrorists, or the Southern white resistance, prevailed.²⁷ Regardless, while the North had won the military battle, it had failed to secure the political, moral victory that President Lincoln had declared in the Emancipation Proclamation. As noted African-American civil rights activist W.E.B. DuBois lamented, "The slave went free; stood a brief moment in the sun; then moved back again toward slavery."²⁸

Further interventions occurred in the succeeding years, in various locales, as the Army responded to labor strikes and civil unrest chiefly as a result of modernization, immigration, and racial and cultural conflicts.²⁹ During and immediately after World War I, Secretary of War Newton Baker suspended the PCA, allowing the military to respond to incidents of civil rights demonstrations and labor disputes.³⁰ Army forces were used 29 times in the four years of Newton's "Direct Access Policy."³¹ The wave of anarchist bombings and acts that swept the country in the late 19th and early 20th century, including the assassination of President William McKinley, interestingly, did not invoke a military response. Instead, the government dealt with the anarchists through civil law enforcement and immigration policy reforms.³²

In the post-World War II era, as integration of the federal civil and military services ensued under President Harry Truman, conflict over racial equality initiated a

new series of domestic military interventions.³³ The 1954 US Supreme Court decision in the landmark *Brown v. The Board of Education of Topeka, KS*, led to the federalization of the Arkansas Army and Air National Guards and the introduction of a battle group from the 101st Airborne Division to enforce school integration in Little Rock in September 1957.³⁴ Similar scenarios developed in Oxford, in 1962, at the University of Mississippi, and in 1963 in Tuscaloosa, at the University of Alabama, as federalized guardsmen and, in the former case, active duty troops, enforced integration mandates.³⁵ Racial tensions continued through the 1960s as riots and demonstrations erupted in Birmingham, Tuscaloosa, Detroit, Washington, Chicago, and Baltimore. Military interventions of federalized state forces and/or active duty units followed. Conversely, as America's involvement in Vietnam lost popular support, protests, rallies, demonstrations, and marches generally entailed alerts and pre-positioning of state and federal forces, but little direct intervention, save for the tragedy at Kent State University, in Ohio, in May 1970.³⁶

Previously, in 1956, Congress codified the 1807 law and several previous enactments into Title 10, US Code, Sections 331 – 334, authorizing the president to employ military force in the event of insurrections (Section 331), unlawful obstructions against federal authority (Section 332), or hindrance, opposition or obstruction of enforcement of federal laws (section 333), after first issuing a cease and desist order to those individuals or forces in opposition or obstruction (Section 334).³⁷ In that same year, Congress codified the PCA into Title 18, US Code, Section 1385, and included the US Air Force in its provisions and then, in 1959, extended its provisions to the newly-created state of Alaska.³⁸

The list of legal enactments authorizing military support and actual military interventions continued through the remainder of the 20th century into the 21st. The 1973 Wounded Knee incident elicited an important decision by a federal district court defining lawful (passive) and unlawful (active) military support of domestic contingencies short of the constitutional or congressional introduction of military force.³⁹ The 1982 Defense Authorization Act enabled passive military support of counter-drug operations.⁴⁰ The Department of Defense (DoD) then promulgated policy that brought the Navy and Marine Corps under its scope and extended the Act to areas outside the US.⁴¹ The 1989 Defense Authorization Act went one step further by designating DoD as the lead federal agency to plan and budget for passive monitoring of aerial and maritime drug smuggling.⁴² Joint Task Force-Six, established along the US southern border at Ft. Bliss, Texas, in 1989, later designated Joint Task Force North in 2004, would enable a long-term support commitment to the counter-drug effort.⁴³ The 1984 Robert T. Stafford Disaster Relief Act enabled the president to commit DoD resources in the event of natural disasters upon a request by the state governor.⁴⁴ Further legal prescriptions for military assistance in emergencies involving biological weapons, chemical weapons, and other weapons of mass destruction were later codified under Title 18, US Code.⁴⁵ President George H.W. Bush's introduction of military troops to quell the Los Angeles riots in 1992, in the aftermath of the Rodney King incident, proved controversial due to concerns that the federal intervention was unwarranted and the apparent confusion among Army senior leaders on the ground regarding their authority under the PCA.⁴⁶ Further notable assistance was provided in response to Hurricane Andrew in 1992, to

Oklahoma City in 1995 in the Alfred P. Murrah Federal Office Building bombing, and in the 2002 Washington, DC, sniper murders.⁴⁷

The current interest in the Posse Comitatus Act comes in the wake of the 11 September 2001 terrorist attacks and the controversial federal response to Hurricane Katrina in Alabama, Louisiana, and Mississippi.⁴⁸ These emergencies provoked concern that local and state government entities were either incapable or would be quickly overwhelmed by large-scale disasters and that the PCA precluded a timely, effective federal response.⁴⁹ The potential for the introduction of a weapon(s) of mass destruction within the United States contributed to the debate over response capabilities.⁵⁰ Alternatively, policymakers turned to DoD to intervene quickly and decisively to save lives and establish order. That DoD performed well in the post-Katrina environment only contributed to its attractiveness as the force of choice in domestic emergencies. Thus, senior civilian officials began to openly suggest that in order to avert another state-federal debacle the restrictions enumerated in the Posse Comitatus Act needed re-examination.⁵¹

Rather than revise the PCA, the 2007 Warner National Defense Authorization Act (NDAA) for Fiscal Year 2007 attempted an indirect approach. That act amended Title 10, Chapter 15 (Insurrection), Section 333, to allow the president to commit federal and state military resources in a variety of domestic crises without state approval.⁵² It met opposition by state advocates amid accusations that the measure was passed without sufficient public debate.⁵³ HR 869/S 513 bills, calling for the reversal of the Warner amendments to Title 10, subsequently stalled in committee. The President then vetoed HR 1585 (The National Defense Authorization Act for Fiscal Year 2008) on 28

December 2007, including its provisions for reversing Title 10, Chapter 15 (Insurrection). Finally, HR 4986 (The National Defense Authorization Act for Fiscal Year 2008), restoring Title 10, Chapter 15, Section 333 to its original form, was signed into public law by the President on 28 January 2008.⁵⁴

In assessing the long and convoluted legal and military history of federal interventions in the domestic affairs of the United States, one might be tempted to invoke Cicero's dictum on conflict and law ("Silent enim leges inter arma" – In times of war, the law falls silent).⁵⁵ Remarkably, however, history indicates that the PCA has served the country rather well, if only to re-establish the constitutional and congressional provisions of the pre-Civil War era. Despite racial tensions, riots, natural disasters, domestic and foreign terrorist attacks, and the inclination of Congress to create new support missions for the military, a basic framework has enabled military assistance, even intervention, when constitutionally mandated. But with a new domestic super-department recently created to address security at home, and as yet unproven, should the provisions attempted in the 2007 Warner NDAA have been left intact?

To Ensure Domestic Tranquility and provide for the Common Defense ...DHS or DoD?

Since 1878, United States government policy has precluded the active participation of the military in domestic law enforcement efforts, but does not deny support, training, and resources to civil law enforcement and disaster relief efforts. As evidenced in the proceeding section, however, the federal government, in times of crisis, has demonstrated its readiness to invoke Constitutional prerogatives and statutory exceptions to the Posse Comitatus Act that allow the introduction of active duty forces into the crisis at-hand to restore order.

Historically, at least since the War of 1812, the United States has never had significant concern that its borders would be threatened by foreign invasion. Thus, it was not until the 2001 terrorist acts that the federal government began to consider a domestic organizational equivalent to DoD. Out of the post-9/11 world emerged the Department of Homeland Security (DHS), an attempt to organize the myriad facets of the federal government into a cohesive organization that would ensure domestic security in the event of a natural disaster or manmade catastrophe.⁵⁶ Unfortunately, despite the largest re-organization of the federal government since 1947, DHS has yet to prove that it has either an effective organizational structure or process to coordinate and control a large-scale emergency response.⁵⁷ Additionally, a Congressional Research Service report, highlighting an initiative by the Secretary of Homeland Security to re-organize DHS, affords insight into the significant organizational challenges faced by that agency.⁵⁸ Consequently, planning shortfalls, process limitations, and organizational confusion, not legal prohibitions, seem just as responsible, if not more so, for hindering an effective domestic crisis response capability.

That such is the case should not prove surprising. As Woodrow Wilson commented, government innovation occurs slowly and is based on cultural and historical precedent.⁵⁹ Furthermore, the very nature of American government argues against DHS as an effective instrument for national response.⁶⁰ Federalism implies a division of power and authority. Multiple layers of government (national, state, local), divisions of labor within each (executive, legislative, judicial), and further sub-divisions that affect fiscal authorizations and allocations act to disperse power and encourage

compromise.⁶¹ As the Founding Fathers intended, no one branch or level of government would usurp the other; a fine system of checks and balances, but perhaps not an effective mechanism for responding to a national domestic emergency.

One federal department does, however, possess the skill, personnel, and organizational means to coordinate large-scale relief efforts: the Department of Defense. Subsequently, to understand the reliance on DoD in the post-2001 homeland security environment is not difficult. The United States military represents the premiere government resource of the modern era.⁶² Its vast network of assets and the expertise to operate and sustain them, and importantly, its ability to surge operations quickly at the appropriate place and time, are available to support civil operations in times of domestic disaster.⁶³

Yet, with over 100,000 federal law enforcement agents, over 1,000,000 state and local law enforcement officers and a National Guard force of over 460,000, is DoD still a relevant resource for the nation's domestic emergencies?⁶⁴ The answer, of course, is yes. DoD's organization and resources are immensely important to homeland security. Strategically, DoD relies on an active, layered defense that focuses its effort to defend the American homeland by shaping the international environment and securing the global commons.⁶⁵ Notwithstanding, DoD prepares to support civil authorities and other federal agencies as directed by the president and Secretary of Defense on a case-by-case basis, leading, enabling, and supporting efforts overseas and domestically.⁶⁶

Organizationally, DoD has developed an impressive response capability within the current legal structure that has only been enhanced in the post-9/11 world. An assistant secretary of defense position was created in the 2003 National Defense

Authorization Act to oversee and coordinate DoD programs for homeland defense and civil support; the Chairman of the Joint Chiefs of Staff now affects coordination with combatant commands on North American defense issues; DoD created a new geographic combatant command, US Northern Command (USNORTHCOM), based in Colorado Springs, CO, as a means to facilitate the rapid response and integration of military support to civil disaster situations; another combatant command, US Pacific Command (USPACOM), received responsibility for protection of the Hawaiian Islands and territories in the Pacific.⁶⁷ Additionally, the North American Aerospace Defense Command (NORAD) affords early warning capability for the United States and Canada. Other geographic and functional combatant commands, military departments, and defense components are directed to assist in the overall DoD civil support effort.⁶⁸ And all were developed within the constraints of the Posse Comitatus Act.

Furthermore, National Guard forces supplement DHS efforts and offer an alternative to revising or eliminating the PCA. The Guard, serving as the modern-day successor to the militias of the early Republic, can actively perform law enforcement missions in all but a federally-funded, Title 10 role.⁶⁹ Spencer and Wortzel contend that the National Guard's focus should be re-directed to Homeland Security missions as part of a two-front strategy that confronts threats abroad and at home.⁷⁰ A Government Accountability Office (GAO) report found that the hindrance to full and effective use of National Guard resources was due to the lack of "an analytically based process, particularly for large-scale, multi-state natural disasters and terrorist attacks," that determines resource needs.⁷¹ Further, that "federal agencies have not completed an integrated set of plans identifying the capabilities the National Guard would be expected

to provide in response to events like those described in the Homeland Security Council's 15 national planning scenarios."⁷² The GAO remedy would update the National Guard charter and its regulations on support to civil authorities, create internal DoD programs that monitor equipment readiness, and devise funding strategies for equipment requirements.⁷³

Additionally, current fiscal policy, again operating within the constraints of the PCA, enables passive military support of civil law enforcement operations, affording training, equipment, and technology that the States, by themselves, could not afford.⁷⁴ The White House Office of Management and Budget indicates, for the President's requested fiscal year 2009 budget, gross budget authority of \$66.3B for homeland security.⁷⁵ DoD's portion of that funding request represents 25%, or \$17.645B (the DHS portion amounts to 49%, or \$32.8B).⁷⁶ Those fiscal resources enable the military infrastructure that moves significant numbers of personnel and equipment, provides extensive land-based and satellite communications networks, and supports resource planning and coordination, facilitating rapid responses in times of crisis.⁷⁷ With dwindling state surpluses, now and in ensuing years⁷⁸ and increased outlays for Medicaid and employee health insurance costs,⁷⁹ DoD's homeland security budget assumes critical importance since non-federal government spending prioritizes public welfare, education, social insurance, highways, and corrections.⁸⁰

DoD initiatives in response to the Katrina disaster speak further to an impressive capability that operates effectively under the PCA. DoD directed the formation of a joint task force under the command and control of the US Northern Command, eventually contributing over 14,000 active-duty personnel to the relief effort.⁸¹ Additionally, DoD

made available a fleet of approximately fifty helicopters for interagency coordination and aerial damage assessments, transported eight civilian swift water rescue teams from California, and provided a mobile 500-bed hospital. Furthermore, DOD deployed naval forces and assets with competencies in medical support, humanitarian relief, and maritime transportation, including the movement of a hospital ship from Baltimore to the Gulf region. Over 50,000 National Guard soldiers responded to the area through the Emergency Management Assistance Compact (EMAC), an inter-state mutual aid program that facilitates the request and allocation of state resources during crises.⁸²

These accomplishments suggest framing the debate over the PCA not in terms of what it prohibited, but rather what was enabled under its governing terms. Viewed in this context, the PCA might not represent a hindrance to action as much as a means to force policymakers to consider and develop effective domestic response mechanisms that enable DoD to concentrate on its primary homeland defense role. The record indicates a need to affect long-term repairs to DHS, federal, and state shortcomings and interagency coordination, not the introduction of legislation that burdens DoD with responsibilities that may affect its primary homeland defense mission, a conclusion that DoD indirectly endorses.⁸³

Regardless, critics of the PCA argue that for a small act, created to meet the needs of a different time, DoD's resources would be available for any domestic role in the uncertain future. Notwithstanding the existence of DHS, the legal authority to enable military assistance in domestic emergencies already exists, certainly since the PCA was enacted and clearly since the earliest days of the Republic.⁸⁴ The question becomes

whether it is good policy, and in the common interest of the nation, to have it otherwise.⁸⁵

To Promote the General Welfare...PCA: Hindering Security or Ensuring Democracy?

Despite the proven ability of DoD to work within the law, advocates for an improved domestic crisis response capability contend that the PCA jeopardizes security for the American homeland. Michael O'Hanlon of the Brookings Institute argues that the PCA hinders a rapid response by the military in the event of disaster.⁸⁶ Former Acting Deputy Assistant Secretary for Reserve Affairs and Federal Emergency Management Agency official John Brinkerhoff contends that the PCA is so widely misinterpreted that a new, more easily understood legal provision is needed to enable effective use of the military under new operating parameters.⁸⁷ Former Assistant Secretary of Defense for Manpower and Personnel Lawrence Korb suggests that in order to save lives an enabling legal framework is necessary for DoD to respond, whether the circumstance is a natural disaster or a terrorist attack.⁸⁸ Hammond argues for a revision of the PCA in the larger context of more explicit role definitions for military and civilian law enforcement while Miller insists that the PCA inhibits military support to the war on drugs declared by Congress and successive presidents in the 1980s and 1990s.⁸⁹

Conversely, several compelling arguments call into question whether a DoD response to domestic crises is in all cases the right policy choice given a federal system of government.⁹⁰ State stakeholders argue that attempts to eliminate or revise the PCA are a violation of their authority to manage state affairs and a gross infringement by federal authorities into their domain.⁹¹ The reversal of fortune engendered by the 2008

Defense Appropriations Act serves as an example of the efficacy of even indirectly attempting to skirt the PCA through political means.⁹²

Concern also exists that excessive reliance on DoD in a domestic role creates, in Maslow's terms, a mentality that sees every crisis as a military contingency.⁹³ Tierney et al assert that the military can disrupt traditional civilian response patterns that rely on community action, private-public partnerships, and inter-governmental efforts. In other words, too much reliance on the military forsakes the need for formal and informal response initiatives within, or on behalf of, the affected community.⁹⁴ Quillen, while acknowledging a confusing array of legal exceptions, suggests expanding the president's and DoDs authority to declare a National Defense Area as a vetted concept that would preserve the PCA, yet mitigate state-federal conflict in the event of a nuclear disaster.⁹⁵

Equal concern exists that proliferate domestic missions infringe on the military's ability to manage its many global commitments.⁹⁶ To exacerbate that challenge, defense analysts report that force transformation efforts will leave the Army with forty fewer maneuver battalions, resulting in a 20% decrease in the Army's ability to control terrain, or approximately 20,000 fewer soldiers in direct combat roles.⁹⁷ The projected costs of re-setting the force due to current combat degradation and equipping the new modular force, estimated at \$190B through 2013, strains DoDs ability to maintain sufficient manpower and materiel resources to respond to a major domestic contingency.⁹⁸ Questions also arise as to whether the National Guard can sustain a domestic role and continue to field the combat power DoD relies on for its homeland defense mission without significant re-organization and a new strategy for the reserve components.⁹⁹

Furthermore, the pervasiveness of the military in the international environment, as an instrument of national power measured in terms of fiscal resources, invites concern that the same tendency would emerge domestically given a lack of legal restraint.¹⁰⁰

With regard to civilian law enforcement support, especially the application of force, the military approach differs significantly from the approach used by civilian authorities.¹⁰¹ Civilian law enforcement applies force to quell resistance, affect arrests, and restore order; its application is fast, temporary and a measure of last resort.¹⁰² The military employs overwhelming force to destroy the threat, a completely different mindset.¹⁰³ Employing that mindset in a civilian setting portends dire consequences for the civilian population.¹⁰⁴

Cultural implications offer another reason to pause before drinking too deeply from the well of military resources. Richard Kohn asserts that a military focused internally has a corrosive effect on itself and society.¹⁰⁵ Watson foresees further potential cultural ambiguities for a civilian population that increasingly relies on its military force to respond to contingency scenarios, suggesting that in extreme crises the military could be blamed for responding too forcefully to exigent circumstances.¹⁰⁶ Adams suggests that military intervention hinders the development of democracy with a follow-on effect in the international environment.¹⁰⁷ Holsti's examination of military and civilian leaders' attitudes on foreign and domestic issues indicated a trend within military officer ranks toward conservative philosophies, a source of potential conflict if and when military forces are directed to intervene domestically.¹⁰⁸ Similarly, Fuerth comments on "an unhealthy trend" in civil-military relations when civil governance fails to keep pace

with advanced military networked systems, suggesting a tendency for military systems to displace civil ones in crisis situations.¹⁰⁹

Conclusion...Securing the Blessings of Liberty

Regardless of its original intent, policymakers have not allowed the PCA to hinder practical necessity. If the worst should befall the United States, DoD has created an effective strategy and capability that can and will function, as witnessed during the Katrina disaster, to preserve order and restore peace, although there are associated tangible and intangible costs that must be recognized and accepted. In a support role, DoD is an invaluable and indispensable asset to domestic contingencies.

Conversely, DHS response capabilities must improve. Otherwise, the department's *raison d'être* becomes suspect, especially if, as critics of the PCA suggest, DoD should assume a greater role in domestic emergencies. DHS must develop a strategy and network that not only leverages the federal interagency effort, but fuses state and local response capabilities. Furthermore, the National Guard, in its historic role as the militia of America's early years, provides a ready force, enhanced by the Emergency Management Assistance Compact, to assist the DHS effort. A time may come, however, when the Guard must choose between its homeland security and defense roles. In the meantime, state civilian and military representatives have certainly made clear their preference to continue within the existing framework.

Beyond these considerations, the PCA serves as the breaker switch that prevents the national response grid from short-circuiting with too easy an influx of military assistance. While arguments can certainly be made to revise or rescind the PCA, it has checked the use of military force in domestic crises and the tendency to

seek easy, immediate solutions to complex, long-term issues. Its unintended consequences have provided domestic security within a democratic polity.

In the midst of 9/11 and Katrina, America awoke to a new future. The effects of globalization brought home to Americans in frightening, unrealized terms domestic vulnerabilities that could no longer be ignored. There are no perfect solutions that will restore that security. The Posse Comitatus Act is itself, an imperfect law. Rescinding it or changing it, however, will not improve the Nation's response to future domestic disasters, but might well threaten the culture of democracy at home and degrade its ability to confront myriad challenges abroad. With the PCA in place, lawmakers are compelled to focus on improvements to civilian processes and organizations that, in the end, better serve the tenants of democracy enumerated in the Constitution, a unique legacy for an act intended to suppress liberty rather than promote it.

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⁴ Steven Young, "The Posse Comitatus Act: A Resource Guide," 17 February 2003; available from <<http://www.llrx.com/features/posse.htm>>; Internet; accessed 24 March 2008.

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⁸ Coakley, 7.

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¹⁰ Coakley, 15.

¹¹ Matt Matthews, The Posse Comitatus Act and the United States Army: A Historical Perspective, Global War on Terrorism Occasional Paper 14 (Fort Leavenworth, KS: Combat Studies Institute Press, 2006), 7-8.

¹² "The Militia Act of 1792," available from http://www.constitution.org/mil/mil_act_1792.htm; Internet; accessed 24 March 2008.

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¹⁴ Coakley, 83. "...that in all cases of insurrection or obstruction to the laws, either of the United States or of any individual State or Territory, where it is lawful for the President of the United States to call for the militia for the purpose of suppressing such insurrection or of causing the laws to be duly executed, it shall be lawful for him to employ, for the same purposes, such part of the land and naval force of the United States as shall be judged necessary, having first observed all the prerequisites of the law in that respect."

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¹⁶ Coakley, 130-131.

¹⁷ Coakley, 128, 132, 137. "A Marshal of the United States, when opposed in the execution of his duty, by unlawful combinations, has authority to summon the entire able-bodied force of his precinct, as a posse comitatus. The authority comprehends, not only bystanders and other citizens generally, but any and all organized armed forces, whether militia of the state, or officers, soldiers, sailors, and marines of the United States." References to previous legal provisions include the laws established in the second Calling Forth Act of 1795 and the Act of 8 March 1807.

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¹⁸ Gautham Rao, "The Federal Posse Comitatus Doctrine: Slavery, Compulsion, and Statecraft in Mid-Nineteenth-Century America," Spring 2008; available from <http://www.historycooperative.org/journals/lhr/26.1/rao.html>; Internet; accessed 15 March 2008.

¹⁹ Matthews, 27.

²⁰ Matthews, 24-30.

²¹ Ibid, 30.

²² Ibid.

²³ John R. Brinkerhoff, "The Posse Comitatus Act and Homeland Security," February 2002; available from <http://www.homelandsecurity.org/journal/Articles/brinkerhoffpossecomitatus.htm>; Internet; accessed 25 March 2008.

²⁴ Matthews, 32-33.

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²⁶ Paul J. Scheips, The Role of Federal Military Forces in Domestic Disorders, 1945-1992, Army Historical Series (Washington, DC: Center of Military History United States Army, 2005), 449.

²⁷ Richard H. Drew, "Terrorism and the American Constitutional Order," 1-4 September 2005; available from <http://www.artsci.lsu.edu/voegelin/EVS/2005%20Papers/Richard%20Drew.htm>; Internet; accessed 25 March 2008. If true, the analogy suggested by Drew would seem to counter contemporary assertions that rescinding the Posse Comitatus Act would enable the military to respond effectively to terrorist attacks or an active, determined insurgency. The military's uneven success with insurgents and terrorists abroad, while beyond the scope of this paper, bodes ill for their role in similar situations within the American homeland.

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²⁹ Clayton D. Laurie and Ronald H. Cole, The Role of Federal Forces in Domestic Disorders, 1878-1945, Army Historical Series (Washington, DC: Center of Military History), 4. Locations of intervention included the Trans-Mississippi West region, the Washington and Wyoming territories, Idaho, Chicago, Colorado and Arkansas among others.

³⁰ Matthews, 39.

³¹ Felicetti and Luce, 101.

³² Drew, <http://www.artsci.lsu.edu/voegelin/EVS/2005%20Papers/Richard%20Drew.htm>.

³³ Scheips, 17-18.

³⁴ Ibid, 46-47.

³⁵ Ibid, 104, 150.

³⁶ Ibid, 404-407.

³⁷ Stephen E. Young, comp., The Posse Comitatus Act of 1878: A Documentary History (Buffalo, NY: William S. Hein & Co., Inc), Document No. 6.

³⁸ Ibid.

³⁹ Ibid, Document No. 54. Following the 1973 incident at Wounded Knee, US v. Red Feather, 392 F. Supp 916 (D.C.S.D 1975), defined passive, and acceptable, support as military personnel under orders to report on the necessity for military intervention; preparation of contingency plans to be used if military intervention is ordered; advice or recommendations given to civilian law enforcement officers by military personnel on tactics or logistics; presence of military personnel to deliver military material, equipment or supplies, to train local law enforcement officials on the proper use and care of such material or equipment, and to maintain such material or equipment; aerial photographic reconnaissance flights and other like activities. Active, and prohibited, military support was defined as the arrest; seizure of evidence; search of a person; search of a building; investigation of crime; interviewing witnesses; pursuit of an escaped civilian prisoner; search of an area for a suspect or other like activities.

Scheips, 438.

⁴⁰ Matthews, 44.

⁴¹ Felicetti and Luce, 103.

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⁴³ "History of Joint Task Force North," n.d.; available from <http://www.jtfn.northcom.mil/subpages/history.html>; Internet; accessed 9 March 2008. Commensurate with its re-designation, the mission of JTF North was expanded to include counter-terrorism support in addition to its standing counter-drug efforts.

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⁴⁵ Young, Document Nos. 8, 9, & 10.

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⁴⁷ Lujan, 83, 85.

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⁶⁰ Cornell University Law Center, "Tenth Amendment Reserved Powers," n.d.; available from <http://www.law.cornell.edu/anncon/html/amdt10_user.html>; Internet; accessed 9 April 2009. The Tenth Amendment to the United States Constitution reserves all power and authority not exclusively enumerated for the national government, or prohibited by it, to the States.

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¹⁰⁵ Kohn, 190. "...regular armed forces need to face outward, against American enemies, rather than inward where a military force can become an institution acting on behalf of one part of the community against another. That corrodes the morale of the forces, harms recruiting, reduces readiness, undermines the support of the country for the armed forces, and ultimately drives a wedge between the military and society."

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¹⁰⁹ Fuerth, 60.